BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 28676 (Sub-No. 5)

GRAND TRUNK WESTERN RAILROAD – CONTROL – DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY AND DETROIT AND TOLEDO SHORELINE RAILROAD COMPANY (Arbitration Review)

REPLY IN OPPOSITION TO PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY

Pursuant to 49 C.F.R. § 1104.13, Canadian National/Grand Trunk Western Railroad (hereinafter "GTW" or the "Carrier"), hereby responds to the Petition for Review filed on or about May 4, 2005 by Larry G. Thornton on behalf of T.W. Black and T.K. Sorge (hereinafter "Claimants"). Through that Petition, Claimants seek review of an arbitration award issued by Arbitrator Thomas N. Rinaldo in which Arbitrator Rinaldo found three separate and independent bases for denying Claimants' claim for protective benefits, any one of which, standing alone, would have been sufficient to deny the claim. First, Arbitrator Rinaldo held that the New York Dock arbitration panel which he had been selected to chair lacked jurisdiction over Claimants' claims for protective benefits. Alternatively, Arbitrator Rinaldo found that Messrs. Black and Sorge were not entitled to benefits because they had never filed a proper claim, and more importantly, because they had refused to comply with the basic obligation to accept available employment opportunities elsewhere when their Carmen positions were abolished, as required by the plain language of the governing implementing agreement.

The bulk of Claimants' Petition consists of a sequence of ad hominem attacks on the ethics of the Arbitrator and allusions to conspiracies between the Carrier and the Brotherhood of Railway Carmen Division of the Transportation•Communications International Union ("BRC" or the "Organization"), the labor organization representing the craft or class of Carmen on GTW. However, shorn of its harsh rhetoric, Claimants' Petition, at bottom, consists of nothing more than Claimants' disagreement with Arbitrator Rinaldo's factual determinations and his application of settled legal principles. And, while Claimants attach to their Petition a list of fourteen separate "QUESTIONS THAT NEED ANSWERED," those fourteen questions

essentially involve only variations on the three issues addressed by Arbitrator Rinaldo in his Award.

As demonstrated more fully below, Claimants' Petition for Review fails to satisfy the Board's Lace Curtain standard as to any of the three bases for denying their claim set forth in Arbitrator Rinaldo's Award, and review of that Award should be denied for the following reasons:

(1) Arbitrator Rinaldo's determination that the arbitration panel in this case lacked jurisdiction over Claimants' claims for benefits represents a straight-forward application of the settled principle that the exclusive forum for the resolution of disputes over claims for benefits by union-represented employees under implementing agreements negotiated by a carrier and a labor organization acting as the duly authorized representative of a particular craft or class is an arbitration panel established by the carrier and that organization. See Louisville & Nashville R.R. Co. v. Cantrell, 215 F. Supp. 229, 238 (M.D. Tenn. 1962), aff'd sub nom., Batts v. Louisville & Nashville R.R. Co., 315 F.2d 22, 27 (6th Cir. 1963). In this case, it is undisputed that Claimants were members of BRC, and the implementing agreements Arbitrator Rinaldo was called upon to interpret were negotiated between GTW and BRC. Because BRC, not Mr. Thornton, is the "duly authorized representative" of employees in the Carmen craft or class on GTW, Arbitrator Rinaldo properly concluded that Mr. Thornton had no authority to interpret, apply or enforce agreements negotiated by BRC, and that any claims under those agreements could be resolved only before an arbitration panel established by GTW and BRC. This conclusion is consistent with well-established legal principles, and does not present any recurring or otherwise significant issue of general importance under the Board's labor protective conditions that would warrant review under the Lace Curtain standard.

(2) Likewise, Arbitrator Rinaldo's alternative holding that Claimants' claims were "procedurally unsound" because they had never filed a formal claim identifying the "transaction" supporting their claim for benefits also represents nothing more than the straight-forward application of established New York Dock arbitration precedent. Under New York Dock, the party seeking protective benefits must "identify the transaction and specify the pertinent facts of that transaction relied upon." See, New York Dock, Art I, § 11(e). As recounted in Arbitrator Rinaldo's Award, Claimants failed to comply with this basic requirement. Claimants utterly fail to address this holding in their Petition, and offer no reason for the Board to review Arbitrator Rinaldo's Award on this point.

(3) Finally, Arbitrator Rinaldo's ruling on the merits that Claimants were not entitled to protective benefits under the applicable implementing agreement because they declined other available employment opportunities when their Carmen positions were abolished is also fully supported by both the record and established precedent. In his Award, Arbitrator Rinaldo relied on the plain language of the applicable implementing agreement, which expressly required Claimants to accept a transfer to fill an available vacancy on pain of having their protective benefits suspended, as well as a long line of precedent interpreting and applying various other labor protective agreements. Therefore, Claimants cannot establish that Arbitrator Rinaldo's Award fails to draw its essence from the labor protective conditions imposed in this case, or that it is otherwise irrational for purposes of the Lace Curtain standard. Accordingly, Claimants' Petition for Review should be denied for this reason as well.

II. COUNTER-STATEMENT OF FACTS

A. Applicable Agreements

As recounted in Arbitrator Rinaldo's Award, this case arises out of a series of implementing agreements related to GTW's acquisition of the Detroit, Toledo & Ironton Railroad ("DT&I"), and the Detroit & Toledo Shore Line Railroad ("DTSL"). In September 1979, GTW entered into an implementing agreement with BRC and other labor organizations representing employees in various crafts or classes on GTW, DT&I and DTSL to provide the required labor protective benefits in connection with GTW's acquisition of DT&I and DTSL. A copy of that agreement is attached to Claimants' Petition as Attachment 1. The 1979 Agreement provided, inter alia, automatic certification of active employees on GTW, DT&I or DTSL as adversely affected, and lifetime protection for employees designated as "protected employees" under that Agreement. The 1979 Agreement expressly provided that it would not be effective with respect to employees in the various crafts or classes covered by the agreement until two conditions were satisfied – first, that the ICC approve GTW's control application; and second, that GTW and the labor organization representing a particular craft or class negotiate a "single working agreement" for all employees on the three railroads represented by that organization.

In September 1981, BRC and GTW negotiated an agreement governing all BRC-represented employees on the combined GTW system. Relevant parts of that agreement, hereinafter referred to as the "1981 Agreement," are attached hereto as Exhibit A.[1] Agreement H of the 1981 Agreement clarified the Carrier's right to transfer work and/or employees throughout the GTW system, and established procedures for such transfers. In particular, Section II of Agreement H established procedures for transferring protected employees to fill vacancies.

[1] While Arbitrator Rinaldo specifically relied on the provisions of the 1981 Agreement in his analysis of the merits of Claimants' claims in this case, Claimants did not include a copy of that Agreement with their Petition. Accordingly, the Carrier has submitted a copy of the relevant portions of the 1981 Agreement with this Reply.

Paragraph 2 of Section II addressed the filling of vacancies by protected employees who would be required to change their residence, and requires the Carrier to offer such employees four options:

> If the procedure set forth in paragraph 1 [which governs transfers of employees who would not be required to change their residence] does not result in the position being filled then the position may be offered to those B.R.C. furloughed protected employees at other points receiving compensation pursuant to the September 4, 1979 Agreement in reverse order of seniority date as a carman (See paragraph 5), who would be required to change their residence. An employee offered a position pursuant to this paragraph will be given four options: (1) Transfer to the new seniority point, with moving benefits if change of residence is required and actually made; or (2) transfer to an available job in his craft for which qualified at another point, with moving benefits if change in residence is required and actually made, retaining his seniority at his original point until he can hold a regular assignment there, at which time he must decide and advise the Carrier in writing which point he desires his seniority to be maintained; or (3) elect to take separation pay computed in accordance with Section 9 of the Washington Job Protection Agreement of May, 1936; or (4) continue on a furloughed status with suspension of all protective benefits with rights and obligations to recall to service in his craft in accordance with existing schedule rules. If upon recall his protective period has not expired, he will again be subject to protective benefits.

See Exhibit A; see also Award at 4-5.

The third implementing agreement at issue in this case, and the one on which Claimants' demand for benefits rests, is a March 1983 implementing agreement that modified the manner in which displacement and dismissal allowances would be paid to employees certified as adversely affected in accordance with the 1979 and 1981 agreements. A copy of the March 1983 Agreement is attached to Claimants Petition as Attachment 2. In his Award, Arbitrator Rinaldo quoted from Section 1 of the March 1983 Agreement, which states:

> The following shall be substituted in place of the monthly displacement allowance entitlement provided for in Section 5(a) of "New York Dock" and the monthly dismissal allowance

> entitlement provided for in Section 6(a) of "New York Dock": All protected employees who are certified as adversely affected pursuant to Section B of Agreement "F" dated September 23, 1981, who would otherwise stand to be furloughed as a result of a reduction in force will, during their protective period be placed on an Extra Board for four consecutive days each calendar week and will be guaranteed a minimum of 7 hours at the straight time hourly rate of pay (including COLA) of a Carmen Welder employee for each of the four days.

See Award at 6. As can be seen from this contract provision quoted by Arbitrator Rinaldo, the March 1983 Agreement modified only the manner in which a displacement or dismissal allowance would be paid by requiring employees eligible for such an allowance to be available for work off a guaranteed extra board. Nothing in the March 1983 Agreement restricted the Carrier's right to transfer employees who would otherwise be furloughed to fill vacancies elsewhere on the GTW system, or eliminated an employee's obligation to accept such a transfer as a condition of maintaining eligibility for protective benefits.

B. Claimants' Claims In This Case.

As recounted in Arbitrator Rinaldo's Award, Claimants were among seven Carmen at the Carrier's Lang Yard facility in Toledo, Ohio who were notified on April 13, 2004 that their positions would be abolished at the conclusion of their shift on April 25, 2004. See Award at 1. When these employees were notified of the abolishment of their positions, they were also offered several options in accordance with the terms of the 1981 Agreement, including exercising their seniority to displace "T Carmen" at Flat Rock, Michigan; taking a separation allowance in accordance with the Washington Job Protection Agreement; accepting a transfer to fill vacant Carmen positions at Flint, Michigan; or accepting a furlough at Toledo without protective benefits. See Award at 2

An exchange of correspondence between Claimants and Carrier officials followed, which is summarized on page 2 of Arbitrator Rinaldo's Award, in which Claimants

asserted that the March 1983 Agreement required the Carrier to establish an extra board at Toledo and place them on it, and in which the Carrier reiterated its position that Claimants were being offered the four options described above, and advised them that their refusal to accept any of those options was, by default, deemed to be acceptance of a furlough at Toledo without protective benefits. See Award at 2; see also, Attachment 13 to Claimants' Petition.

Claimants then sought to arbitrate their demand that the Carrier place them on an extra board at Toledo. As described in Arbitrator Rinaldo's Award, on May 3, 2004, Claimants sent a letter to the Jack Gibbins, the Carrier's Director, Labor Relations, which Claimants characterized as "official notice that we are requesting 'arbitration of dispute' per Finance Docket 28250, 'New York Dock' Appendix III, No. B, C, D, E," and on May 5, 2004, Claimants sent another letter purporting to designate Mr. Thornton "as the employee representative on the Arbitration Committee." See Award at 2. The Carrier responded by letter dated May 27, 2004. In that letter, the Carrier denied Claimants' demand to proceed to arbitration on the ground that Claimants had "not filed a proper claim under the provisions of any of the above [implementing] agreements, or the New York Dock Protective Conditions." The Carrier also objected to Claimants' efforts to designate Mr. Thornton to serve as their representative. In that regard, Mr. Gibbins informed Claimants that he had "been advised by officials of the union that Mr. Thornton has no authority to interpret any agreements made between the company and the organization." See Award at 2-3.

Claimants ultimately asked the National Mediation Board ("NMB") to appoint a neutral to decide their claims. In turn, the NMB asked the Carrier and BRC for comments on Claimants' request for appointment of a neutral. By letter dated June 28, 2004, BRC General

Chairman, J.V. Waller, responded to the NMB. This letter, upon which Arbitrator Rinaldo placed great weight in denying Claimants' claims on the merits, reads as follows:

> In your letter of June 21, 2004, you advised that you were furnishing Mr. Gibbins and the undersigned with a copy of your letter for any comments that we might care to make in regards to this matter. First, I have not filed a claim under the provisions of New York Dock in behalf of the employees referenced in your correspondence. I have advised the employees Local Chairman that under the circumstances involved in this matter that ***there is no basis for a claim under the current controlling Agreement, or any other Agreements***. The employees did not agree with my decision and have appealed same through the proper internal channel of Our Organization. These employees have initiated this action with the Board of their own accord. The Carrier offered these employees employment at other locations, which they declined. ***Since the employees declined these offers of employment, there are no Agreement provisions, to now pursue a claim.*** Technically, these employees have never made a written request that I file a claim in their behalf.

See Award at 16 (emphasis added).

Notwithstanding the Organization's explicit denial that there was any contractual basis for Claimants to pursue a claim, and the Carrier's continued objection to proceeding (based on the absence of a properly filed claim and Mr. Thornton's lack of authority to interpret or apply BRC implementing agreements), the NMB issued a list of potential neutrals, from which the parties selected Mr. Rinaldo to serve as the chair of the arbitration panel. See Award at 3.

After Mr. Rinaldo was appointed to serve as neutral, Claimants asked for a procedural ruling on the Carrier's stated objection to dealing with Mr. Thornton as their purported "representative." By letter dated November 24, 2004, Mr. Rinaldo advised the parties as follows, "As I understand it, the Brotherhood of Railway Carmen is not participating in these proceedings. That being the case, then the Claimants have the right to select anyone to represent them in these proceedings and as I understand it they have selected Mr. Thornton who I will accept as the Claimants representative." A copy of this letter is attached to Claimants' Petition

as Attachment 7. By letter dated December 3, 2004, the Carrier stated that it would "adhere to [Mr. Rinaldo's] acceptance of Mr. Larry Thornton as the representative for the employees in this matter." A copy of that letter is attached to Claimants' Petition as Attachment 8. However, nowhere in this exchange of correspondence did Mr. Rinaldo ever rule that Mr. Thornton was, in fact, authorized to interpret or apply BRC's agreements with the Carrier, nor did he make a final ruling that the arbitration panel, as constituted, had jurisdiction over Claimants' claims.

A hearing was held on March 3, 2005 in Chicago. At the hearing, Arbitrator Rinaldo presided as the neutral chair of the arbitration panel. Cathy Cortez, the Carrier's Manager, Labor Relations served as the Carrier member. Over the Carrier's renewed objection to Mr. Thornton's designation as the Employee member of the arbitration panel, Arbitrator Rinaldo permitted Mr. Thornton to serve as the Employee member of the panel. Mr. Thornton also presented Claimants' position, and both Mr. Black and Mr. Sorge were given the opportunity to make statements. The undersigned counsel for the Carrier presented the Carrier's position.[2] Arbitrator Rinaldo issued an Award dated April 15, 2005, which was signed by Ms. Cortez as the Carrier member. Mr. Thornton submitted a dissenting opinion, and, on or about May 4, 2005, filed the instant Petition on behalf of Claimants.

III. ARGUMENT

A. The Lace Curtain Standard of Review for Arbitration Awards.

Pursuant to 49 C.F.R. § 1115.8, the standards governing Board review of a New York Dock arbitration award are set forth in Chicago and North Western Transp. Co. – Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom., International Bhd. of Elec. Workers v. Interstate Commerce Comm'n, 862 F.2d 330 (D.C.Cir. 1988) ("Lace Curtain"). Under the Lace

[2] Contrary to Claimants' assertion in their Petition, the undersigned counsel did not serve as the Carrier member of the arbitration panel.

Curtain standard, the Board's review of arbitration decisions is limited to "recurring or otherwise significant issues of general importance regarding the interpretation of [the Board's] labor protective conditions." Lace Curtain, 3 I.C.C.2d at 736. An arbitrator's decision is accorded substantial deference, and the Board will not review "issues of causation, calculation of benefits, or the resolution of factual questions" in the absence of egregious error. Id. To demonstrate "egregious error" warranting Board review, Claimants must demonstrate that the arbitrator's award was "irrational, wholly baseless and completely without reason, or actually and indisputably without foundation in reason and fact." American Train Dispatchers Ass'n v. CSX Transp. Inc., 9 I.C.C.2d 1127, 1131 (1993); see also, Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 31, 37 (D.C.Cir. 2004). In summary, the Board generally will not overturn an arbitration award "unless it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or is outside the scope of authority granted by the conditions." Union R.R. Co. and Bessemer and Lake Erie R.R. Co. – Arbitration Review – United Steelworkers of America, Finance Docket 31363 (Sub-No.3), Slip op. at 7 (December 17, 1998), aff'd sub nom., Union R.R. Co. v. United Steelworkers of America, 242 F.3d 458, 468 (3d Cir. 2001).

Under the Lace Curtain standard, Claimants' Petition must be denied. Claimants' Petition fails to identify any recurring or otherwise significant issue of general importance concerning the Board's standard labor protective conditions. Moreover, Claimants cannot satisfy their burden of demonstrating that Arbitrator Rinaldo's Award was irrational, failed to draw its essence from the imposed labor conditions or was otherwise outside the scope of his authority so as to justify review under the Lace Curtain standard. On the contrary, Arbitrator Rinaldo's Award represents a reasoned and well-supported application of settled legal principles, and the

straight-forward application of unambiguous contract language consistent with the manner in which the Board's labor protective conditions have been applied for decades. Accordingly, Claimants' Petition for Review should be denied.

B. Arbitrator Rinaldo's Determination That The Arbitration Panel Lacked Jurisdiction To Interpret Agreements Made By The BRC Does Not Involve Any Recurring Or Otherwise Significant Issue Under The Board's Labor Protective Conditions.

Arbitrator Rinaldo's primary holding in this case was that the arbitration panel lacked jurisdiction to decide Claimants' claim that the Carrier's implementing agreements with BRC required the Carrier to establish an extra board at Toledo for them. In that regard, Arbitrator Rinaldo concluded that the exclusive forum for resolving Claimants' claims would be an arbitration panel established by the Carrier and BRC. This conclusion is completely consistent with established precedent and binding legal principles under the Railway Labor Act ("RLA") and the Interstate Commerce Act, as amended, ("ICA"), and does not present any recurring or otherwise significant issue of general importance regarding the interpretation of the New York Dock conditions. Thus, Claimants' Petition for Review should be denied.

In reaching the conclusion that the panel lacked jurisdiction, Arbitrator Rinaldo explicitly relied on the Supreme Court's decision in Virginian Ry. Co. v. System Fed. No. 40, 300 U.S. 515, 548 (1937), in which the Court held:

> The obligation imposed on the employer by section 2, Ninth (45 U.S.C. § 152, subd.9), to treat only with the true representative of the employees as designated by the National Mediation Board, when read in light of the declared purposes of the act, and of the provisions of section 2, Third and Fourth, (45 U.S.C. § 152, subds. 3, 4), giving to the employees the right to organize and bargain collectively through the representative of their own selection is exclusive. ***It imposes the affirmative duty to treat only with the true representative, and hence, the negative duty to treat with no other.***

Id.(emphasis added); see Award at 14.

Arbitrator Rinaldo explained that "the affirmative duty and the negative duty identified by the Supreme Court extends to agreements concerning protective conditions, including those before the Board in this case." Award at 14. Furthermore, Arbitrator Rinaldo explained that there is established precedent which "stand[s] for the proposition that only BRC can be considered the 'duly authorized representative' of the Claimants and that the claim herein is to be processed only under agreements negotiated by BRC. Hence, the Board agrees with the Carrier the only proper forum in which Claimants could pursue the claim brought before this Board would be by submitting said claim to an arbitration panel that was established by the Carrier and BRC as the Claimants' 'duly authorized representative.'" Id.

As Arbitrator Rinaldo indicated in his award, this conclusion is clearly consistent with well-established judicial precedent and decisions of the Board. As a threshold matter, the ICA reserves the right to negotiate implementing agreements providing for the required protective arrangements for employees affected by rail mergers to the duly authorized representative of those employees. Under 49 U.S.C. § 11326(a), the STB must require an applicant seeking approval of a rail merger to provide a "fair arrangement" to protect the interests of its employees, and the statute expressly contemplates that such a "fair arrangement" may be "made by the rail carrier and the ***authorized representative*** of its employees." Id. (emphasis added).

Based on virtually identical language in former section 5(2)(f) of the Interstate Commerce Act, the Court in Louisville & Nashville R.R. Co. v. Cantrell, 215 F. Supp. 229 (M.D. Tenn. 1962), held that the arbitration procedures negotiated by the carrier and the labor organization representing the affected employees under the ICC's so-called "Oklahoma Conditions" were the exclusive dispute resolution procedure for claims to protective benefits

under those Conditions. In doing so, the Court rejected the employees' arguments that they were not bound by the agreements made by the organization, and that the term "duly authorized representative" as used by the ICC did not mean the duly authorized representative of the employees' craft or class under the RLA. The Court specifically emphasized the importance of having such disputes governed by procedures agreed to by the Carrier and the union representing the Carrier's employees. According to the Court:

> If the duly authorized representative under the Railway Labor Act may not bind the class or craft they purport to represent, then serious doubt exists as to whether the duly authorized representatives under the Railway Labor Act can validly enter into agreements with the carrier concerning protective conditions in the first instance.

Cantrell, 215 F. Supp. at 238. The Court ruled that the proper method to be followed in resolving disputes under the protective conditions imposed by the ICC was to follow the arbitration procedures agreed to by the carrier and the union. In sum, the Court concluded, "it was the intention of the Interstate Commerce Commission and the intention of the Interstate Commerce Act, that ***such arbitration machinery should be provided for by the carrier and by the unions certified to represent employees under the Railway Labor Act.***" Id. at 240 (emphasis added).

The District Court's decision in Cantrell was affirmed by the Sixth Circuit in Batts v. Louisville & Nashville R.R. Co., 315 F.2d 22 (6th Cir. 1963). In affirming the District Court's decision, the Court of Appeals explained, "There appears to us nothing unfair or inequitable about requiring a railway employee to submit his individual claim to an arbitration board, the formation of which is agreed upon by the duly certified bargaining agent of the employees and the carrier." Id. at 27.

In a subsequent case involving the rights of unrepresented employees, the ICC recognized that Cantrell had held that the term "duly authorized representative" of employees for purposes of its protective conditions meant the exclusive bargaining representative under the RLA, and "that where such a representative had negotiated arbitration machinery with the railroad, the jurisdiction of the arbitration panel was exclusive with respect to employees represented by the union." Fox Valley & Western Ltd. – Exemption, Acquisition and Operation – Certain Lines of Green Bay and Western R.R. Co., Fox River Valley R.R. Corp. and the Ahnapee & Western Ry. Co., Finance Docket No. 32305, 9 I.C.C. 2d 272, (January 22, 1993). Moreover, the ICC further explained that it understood the Court's decision in Cantrell to hold that "an employee represented by a labor union cannot circumvent agreements made by the union in his behalf." Id.

As these cases make clear, employees who are represented by a labor organization must submit claims for protective benefits to an arbitration panel established by the Carrier and the Organization, and cannot seek to circumvent agreements made by the Organization by purporting to designate another "representative" to interpret those agreements. Arbitrator Rinaldo merely applied these well-established principles to the facts of this case. Therefore, Claimants' Petition does not involve any recurring or otherwise significant issues under the Board's protective conditions for purposes of satisfying the Lace Curtain standard.

The Board's analysis in Union Railroad, supra, Finance Docket 31363 (Sub-No.3), demonstrates that review should be denied in this case. That case involved a petition for review of an arbitration award imposing an implementing agreement pursuant to which clerical employees of the Union Railroad, who were represented by the United Steelworkers of America ("USWA"), were transferred to the Bessemer & Lake Erie Railroad ("B&LE"), where they were

represented by TCU. The USWA sought review of the arbitration award arguing that the transfer of the affected employees to B&LE could not be carried out through the New York Dock process, but had to be bargained under Section 6 of the RLA. The Board denied review, and in language directly applicable to this case, held:

> We find no reason to disturb the arbitrator's award under the Lace Curtain standards. ***There is no issue of first impression; and any issues likely to recur have already been thoroughly resolved by us and the courts.*** USWA has not shown egregious error or any other ground requiring review of the arbitration award here.

Id. at 7-8 (emphasis added).

The same analysis disposes of Claimants' Petition for Review in this case. Claimants' Petition presents no issue of first impression, and the issue of whether an employee is required to submit claims for protective benefits to a panel established by the Carrier and the Organization has been thoroughly resolved by the courts and the Board (or the ICC). Thus, Claimants' Petition should be denied.

Moreover, Claimants do not even attempt to explain how their Petition satisfies the Lace Curtain standards. Instead, Claimants' only argument concerning Arbitrator Rinaldo's jurisdictional decision is that Mr. Rinaldo acted improperly (indeed "unlawfully") by allowing Mr. Thornton to serve as the employee representative on the panel, and then ruling that the panel lacked jurisdiction.

The correspondence preceding the hearing in this case, however, demonstrates only that Mr. Rinaldo chose not to act precipitously by precluding Claimants from presenting their case before he had an opportunity to consider the parties' arguments with the benefit of a fully developed record. At no time did Mr. Rinaldo rule that Mr. Thornton was, in fact, authorized to interpret or apply BRC's agreements. After the parties filed their ex parte submissions, and had the opportunity to present their respective cases, Mr. Rinaldo determined

that the panel did not have jurisdiction. There is nothing underhanded or improper (and certainly nothing unlawful) in proceeding this way. It is not at all uncommon for labor arbitrators to allow parties to present procedural objections as well as their respective cases on the merits before making arbitrability determinations. Arbitrator Rinaldo essentially followed the same process in this case. At a minimum, the fact that Arbitrator Rinaldo initially permitted Mr. Thornton to serve as Claimants' representative, and then, after considering the fully developed record, determined that the panel lacked jurisdiction over Claimants' claims cannot be considered so irrational as to warrant review of the Award in this case under the Lace Curtain standard.

C. Arbitrator Rinaldo Properly Concluded That Claimants' Claims Were Barred Because They Never Filed A Proper Claim For New York Dock Benefits.

Arbitrator Rinaldo also held that Claimants' claim that the Carrier was obligated to establish an extra board at Toledo was barred because Claimants never filed a proper claim for benefits under New York Dock. This conclusion was clearly correct under the plain terms of the New York Dock conditions, which require a claimant to "identify the transaction and specify the pertinent facts of that transaction relied upon." New York Dock, Art. I, § 11(e). In his Award, Arbitrator Rinaldo emphasized the purpose underlying this basic requirement:

> ***New York Dock*** arbitration awards, of which there are many, reflect the need to have a formal claim so that an orderly application of the appropriate burdens of proof can be pursued. Having failed to file a formal claim, the Claimants have not properly presented the Board with a "claim" to be assessed under the terms of ***New York Dock*** and the Parties' Implementing Agreements. Thus, the Board finds the lack of a formal claim to be a second reason why the claim asserted by the Claimants cannot be sustained.

Award at 15.

Claimants do not even address this aspect of Arbitrator Rinaldo's Award in the body of their Petition, and offer no basis for this Board to review the Award under the Lace

Curtain standard. Instead, Claimants merely ask, as one of their "QUESTIONS THAT NEED ANSWERED":

> Does all the letters written by TW Black and Thomas Sorge to the Carrier requesting an EXTRA BOARD as negotiated in "good faith" between BRCA and GTWRR in the 1983 extra board agreement and the Carrier letters denying this claimed right, privilege and benefit constitute a "proper claim" under NYD arbitration resolutions of "DISPUTES" in which this case is about?

See Petition, "QUESTIONS THAT NEED ANSWERED" No. 4. However, merely asking a question falls far short of satisfying Claimants' heavy burden under the Lace Curtain standard of demonstrating that review of the Award is warranted in this case.

More importantly, under the Lace Curtain standard there is no basis for reviewing Arbitrator Rinaldo's Award. As the portion of the Award quoted above makes clear, Arbitrator Rinaldo merely followed the well-established requirements of New York Dock, as spelled out in both the New York Dock conditions, and many arbitration awards thereunder. Thus, like Claimants' challenge to Arbitrator Rinaldo's jurisdictional holding, their challenge to his holding that their claims were procedurally defective because they never filed a proper claim does not involve any issue of first impression, but instead involves only well-established principles that already have been thoroughly resolved. Furthermore, even a cursory review of Claimants' correspondence with the Carrier demonstrates that, in fact, they did not file a proper claim. At a minimum, as to this factual determination, Claimants cannot satisfy their burden of establishing that Arbitrator Rinaldo committed an egregious error, or that his Award was otherwise irrational for purposes of the Lace Curtain standard. Thus, Claimants' Petition for Review should be denied for this reason as well.

D. Arbitrator Rinaldo's Decision On The Merits Is Not Subject To Review Under The Lace Curtain Standard.

A separate and independent reason for denying Claimants' Petition for Review is that Arbitratro Rinaldo's decision on the merits is completely consistent with the plain, unambiguous language of the 1981 Agreement between GTW and BRC, as well as the manner in which the Board has interpreted its labor protective conditions. Arbitrator Rinaldo's determination that Claimants were required under the 1981 Agreement to accept a transfer to fill an available vacancy does not involve any recurring or otherwise significant issue of general importance under the Board's labor protective conditions. Thus, to establish that review is warranted under the Lace Curtain standard, Claimants have the burden of establishing that Arbitrator Rinaldo committed an "egregious error," or that his Award was "irrational, wholly baseless and completely without reason, or actually and indisputably without foundation in reason or fact," or otherwise failed to draw its essence from the governing labor protective conditions. See ATDD v. CSXT, supra, 9 I.C.C.2d at 1131; Union R.R. Co., supra, Finance Docket 31363 (Sub-No. 3), (December 17, 1998), slip op. at 7. Claimants cannot satisfy their burden of establishing that review of Arbitrator Rinaldo's disposition of the merits of their claims is warranted in this case.

In his Award, Arbitrator Rinaldo clearly and carefully spelled out the contractual basis for his decision. In doing so, he explained that the plain language of Section II of Agreement H of the 1981 Agreement required the Carrier to offer Claimants four options, and that their refusal to accept any of those options resulted in them being furloughed without protection. As summarized in Arbitrator Rinaldo's Award:

> Paragraph 2 of Section II of Agreement "H" of the 1981 Implementing Agreement expressly addresses the filling of vacancies by protected employees who would be required to

> change their residence. Agreement "H" of the 1981 Agreement explicitly obligated Claimants to accept a transfer to fill an available vacancy or have their right to protective benefits suspended, as was done in the instant matter. The options the Carrier offered the Claimants, the Board finds, were consistent with the language of paragraph 2 of Section II of Agreement "H" of the 1981 Agreement. Having not elected the first three options, Claimants were thus properly deemed by the Carrier to be placed on furloughed status with suspension of all protective benefits.

Award at 15. Because Arbitrator Rinaldo's determination on the merits is clearly supported by the plain language of the applicable implementing agreement, Claimants cannot establish that his Award involves egregious error or was otherwise irrational so as to justify review under the Lace Curtain standard.

Arbitrator Rinaldo also made a factual determination that his interpretation of the 1981 Agreement was consistent with the manner in which the Carrier and BRC had interpreted that agreement. See Award at 15-16. In reaching that conclusion, Mr. Rinaldo placed "great weight" on the June 28, 2004 letter from BRC General Chairman J.V. Waller to the NMB in which Mr. Waller explicitly stated that under the circumstances presented in this case, "there is no basis for a claim under the controlling Agreement, or any other Agreements." See Award at 16. In addition to this letter, the record presented to Arbitrator Rinaldo also included a sworn Declaration from Marilyn Kovacs, GTW's Manager, Labor Relations, in which Ms. Kovacs explained that the Carrier's interpretation of Agreement H was consistent with the manner in which both the Carrier and the Organization had applied that Agreement in the past.[3] Thus, the record presented to Arbitrator Rinaldo established that both the Carrier and the Organization charged with interpreting, applying and enforcing the applicable implementing agreements agreed that Claimants were required to accept a transfer to fill available vacancies, and that their refusal to do so resulted in them being deemed to have accepted a furlough without protection.

[3] A copy of Ms. Kovacs' Declaration is included with Claimants' Petition for Review as Attachment 10.

This record precludes a finding that Arbitrator Rinaldo's Award constituted egregious error or was otherwise irrational for purposes of the Lace Curtain standard.

Claimants' primary argument in favor of review on this point appears to be that Article I, Section 2 of New York Dock requires that employees' "rights, privileges and benefits" must be preserved, and that Arbitrator Rinaldo's Award somehow "abrogated" Claimants' rights, privileges and benefits under the applicable implementing agreements. See Petition at 1, 3, 5, 7-8, and "QUESTIONS THAT NEED ANSWERED." Claimants' argument is misplaced. First, it is now clearly established that the "term 'rights privileges and benefits' means the 'so-called incidents of employment, or fringe benefits,' . . . and does not include scope or seniority provisions." CSX Corp. — Control — Chessie System, Inc and Seaboard Coastline Industries, Inc. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 27), Slip op. at 15 (November 22, 1995), aff'd sub nom, United Transportation Union v. Surface Transp. Bd., 108 F.3d 1425, 1429-30 (D.C.Cir. 1997). This case does not involve any issue relating to modifications of fringe benefits or other "incidents of employment" as defined under New York Dock. More importantly, Arbitrator Rinaldo's factual determination that the Carrier's application of the 1981 Agreement was consistent with the historical practice on the property disposes of any claim that the Carrier's actions in this case can be characterized as a change in anything. Given the substantial deference due to that factual determination, and the clear record evidence supporting that factual determination, Claimants' repeated invocation of the "rights, privileges and benefits" language from New York Dock, without more, falls far short of satisfying their burden of demonstrating review is appropriate under the Lace Curtain standard.

In addition, Arbitrator Rinaldo found, "The Carrier's challenged decision . . . is consistent with ***New York Dock*** Awards that hold that employees must accept positions that

would require them to move or else be placed on furloughed status without benefits. A consideration of Claimants' arguments, in the Board's estimation, calls for no conclusion different from the findings made herein." Award at 16. On this point as well, Arbitrator Rinaldo's reasoning is supported by long-standing, clearly-established precedent.

This Board, like the ICC before it, consistently has required employees to take advantage of available employment opportunities as a condition of maintaining eligibility for protective benefits. Of particular relevance, in its decision approving the CN/IC transaction, the Board reiterated this established interpretation of an employee's obligations under the standard labor protective conditions, saying:

> A basic part of the bargain embodied in the Washington Job Protection Agreement upon which the New York Dock conditions are based is that rail carriers are permitted to move employees from one work site to another in order to achieve the benefits of a merger transaction. Such displacements do result in hardships for employees whenever they are required to move their place of residence, and New York Dock thus compensates the employee for the cost of the move. Ordinarily, ***applicants are not required to make protective payments to these employees who are offered continued employment, but decline to take advantage of it.***

Canadian National Ry. Co., Grand Trunk Corp. and Grand Trunk Western R.R. Inc. – Control – Illinois Central Corp., Illinois Central R.R. Co., Chicago, Central and Pacific R.R. Co. and Cedar River R.R. Co., Finance Docket No. 33556, Decision No. 37, (May 21, 1999), Slip Op. at 44 (emphasis added); see also, Norfolk and Western Ry. Co. and New York, Chicago and St. Louis R.R. Co. – Merger, etc., (Arbitration Review), Finance Docket No. 21510 (Sub-No. 4), July 14, 1993, 9 I.C.C. 2d 1021, 1027 (1993), aff'd sub nom., United Transp. Union v. Interstate Commerce Comm'n, 43 F.3d 697 (D.C. Cir. 1995). Simply put, in the context of this well-established line of Board and arbitral decisions, Arbitrator Rinaldo's disposition of Claimants' claims indisputably drew its essence from the Board's labor protective conditions, and there is no

conceivable basis for holding that his Award was irrational or otherwise subject to review under the Lace Curtain standard.

E. Claimants' Arguments Concerning The 2001 BRC Collective Bargaining Agreement Are Irrelevant And Are Not Properly Before The Board.

Much of Claimants' Petition appears to be aimed at overturning a 2001 collective bargaining agreement governing the rates of pay, rules and working conditions for BRC-represented Carmen on GTW. A copy of that agreement is attached to Claimants' Petition as Attachment 3. In the 2001 Agreement, GTW and BRC extended attrition protection to all employees in active service on April 9, 2001. In exchange for the Carrier's agreement to extend attrition protection, BRC agreed to grant the Carrier even broader authority to transfer employees. Under the 2001 Agreement, employees may be required to relocate anywhere on the GTW system or on the Illinois Central Railroad.

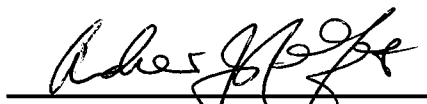
Contrary to Claimants' arguments, the 2001 Agreement did not change the existing protective arrangements as they apply to Claimants in this case. Indeed, the Carrier expressly stated in its submission to the arbitration panel that it was ***not*** relying on the 2001 Agreement in support of its position. Furthermore, according to Claimants' Petition, Arbitrator Rinaldo also stated that the 2001 Agreement "has nothing to do with this case." Petition at 8. Therefore, Claimants' arguments about the validity of the 2001 Agreement, and the numerous exhibits and letters attached to their Petition dealing with application of the 2001 Agreement in other cases, are entirely irrelevant to any issue properly before the Board, and should not be considered in connection with the instant Petition for Review.[4]

[4] Likewise, Mr. Thornton cannot utilize this proceeding, which deals only with the narrow issue of whether Arbitrator Rinaldo's Award should be reviewed, to raise claims involving employees other than the Claimants. See Attachments 4, 11and 14, and letters from Mr. Thornton to the Honorable Vernon Williams dated May 16, 2005. To the extent any of the individuals identified in those attachments or letters have claims involving the interpretation or application of the 2001 Agreement, they must be processed through appropriate procedures on the property and then

IV. CONCLUSION

For all of the foregoing reasons, Claimants' Petition for Review should be denied.

Respectfully submitted,



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submitted to the National Railroad Adjustment Board, or a Public Law Board of coordinate jurisdiction in accordance with Section 3 of the RLA. To the extent those employees purport to have claims under the Board's labor protective conditions or any implementing agreement negotiated thereunder, those claims must be submitted to arbitration in accordance with the applicable conditions or agreements, and not raised with the Board in the first instance.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2005, I caused to be served a true and correct copy of the foregoing Reply to Petition for Review by United States first-class mail, postage prepaid, upon the following:

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Clyde, MI 48049

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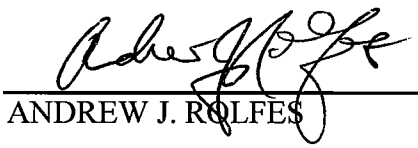

ANDREW J. ROLFES

EXHIBIT A

AGREEMENT "H"

(CARMEN)

FILE: M-20-12-01(6)

AGREEMENT BETWEEN
GRAND TRUNK WESTERN RAILROAD COMPANY
DETROIT, TOLEDO AND IRONTON RAILROAD
AND
BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA (B.R.C.)

- - - - - - - - - -

I. 1. It is the intent and purpose of this Agreement to provide for expedited changes in services, facilities and operations and for the orderly transfer of protected employees, work and positions between the G.T.W. and D.T.&I. Railroads and within the two Railroads. It is also the intent and purpose of this Agreement that the G.T.W. or D.T.&I. Railroad will not be required to hire a new employee at any point for a position that is subject to the G.T.W. - D.T.&I. - B.R.C. Working Agreement at a time that a B.R.C. protected employee who is qualified or has the fitness and ability to become qualified for such position is receiving protection compensation as a furloughed employee pursuant to the September 4, 1979 Agreement.

NOTE: "Protected employee" as used in this Agreement is one defined as such in the September 4, 1979 Agreement.

2. Work, positions and/or employees may be transferred to another seniority point. Prior to any transfer 30-days (90 days if the transfer of employees requires a change in residence) written notice outlining the details of the transfer will be given to the employees and B.R.C. and the procedure set forth below will be followed:

A. POSITION AND WORK BEING TRANSFERRED

(a) At the same time as the notice (30 or 90 days) is given the position will be advertised for seven (7) calendar days at the point where the work and position is being transferred from and awarded to the senior employee applying for the position at that point. Such employee will be transferred at the end of the 30 or 90 day period unless the parties to this Agreement agree otherwise. Employees transferred pursuant to this Section (a) will have their seniority dovetailed at the point where they transfer to.

(b) If no bids are received for the position the Carrier may, at its option, assign the junior protected employee at the point where the work is being transferred from to such position.

NOTE 1: Carrier in assigning employees may not by-pass a junior employee and assign a senior employee.

NOTE 2: If there is more than one position involved the senior of the employees to be assigned will have his choice of positions.

If the protected employee to be assigned pursuant to Section (b) has to change his residence, he will be given four options: (1) transfer with the work to the new seniority point, if such is the case, with moving

benefits if change in residence is required and actually made; or (2) transfer to an available job in his craft for which qualified at another point with moving benefits if change is residence is required and actually made, retaining his seniority at his original point until he can hold a regular assignment there, at which time he must decide and advise Carrier in writing at which point he desires his seniority to be maintained; or (3) elect to take separation pay computed in accordance with Section 9 of the Washington Job Protection Agreement of May 1936; or (4) take a furloughed status with suspension of all protective benefits with rights and obligations to recall to service in his craft in accordance with existing schedule rules. If upon recall his protective period has not expired, he will again be subject to protective benefits. If a protected employee takes option (4) an offer to be assigned to the unfilled position will be made at the point where the work is being transferred from to a furloughed protected employee(s) or a non-protected employee(s) with a seniority date prior to June 25, 1980 who has not yet become a "protected employee". A non-protected employee accepting the offer will be considered a "protected employee" when he physically assumes the position.

NOTE 1: An employee who elects option (2) and changes his residence will not be entitled to moving expenses if he later decides to return to the original point where he holds seniority.

NOTE 2: "Non-protected employee" as used in this Section (b) is an employee with a seniority date prior to June 25, 1980 who has not as yet acquired a "protected" status pursuant to Section 2(c) of the September 4, 1979 Agreement.

(c) Employees transferring to another point pursuant to Section (b) will be entitled to moving benefits if change in residence is required and actually made. Such employees will have their seniority dovetailed at the point where they transfer to, except those employees exercising option (2) will not have their seniority dovetailed. No furloughed employees at the point where the dovetailing takes place will be called back to active service solely because of such dovetailing.

B. WORK TRANSFERRED BUT NO POSITIONS: POSITION ABOLISHED

The regular assigned incumbent of a position that is abolished will be permitted to exercise his seniority at the point from where the work is being transferred.

C. PORTION OF WORK TO BE TRANSFERRED BUT NOT POSITION: POSITION TO REMAIN AT SAME POINT.

A regular assigned incumbent of position from which a portion of work is being transferred will be entitled to exercise

seniority or make a displacement as the result of the transfer of a portion of the work of the position.

II. 1. Any permanent vacancy at any point subject to and covered by G.T.W. - D.T.&I. - B.R.C. Working Agreement un-filled through the seniority processes which would require the hiring of a new employee may be offered to those B.R.C. furloughed protected employees at other points receiving protective compensation pursuant to the September 4, 1979 Agreement in reverse order of *seniority date as a carman (See paragraph 5); such offer will first be made to those employees who could fill the position without requiring a change of residence. Those employees rejecting the offer which will be made in reverse order of seniority will have their protective compensation payments suspended. (See Section 6(d) of New York Dock). If an employee who rejects the offer later accepts the offered position, those employees who had their payments suspended shall, if still entitled to such, have their protective compensation payments restored effective with the date an employee physically assumes the position.

2. If the procedure set forth in paragraph 1 does not result in the position being filled then the position may be offered to those B.R.C. furloughed protected employees at other points receiving compensation pursuant to the September 4, 1979 Agreement, in reverse order of * seniority date as a carman (See paragraph 5), who would be required to change their resi-

dence. An employee offered a position pursuant to this paragraph will be given four options: (1) Transfer to the new seniority point, with moving benefits if change in residence is required and actually made; or (2) transfer to an available job in his craft for which qualified at another point, with moving benefits if change in residence is required and actually made, retaining his seniority at his original point until he can hold a regular assignment there, at which time he must decide and advise Carrier in writing which point he desires his seniority to be maintained; or (3) elect to take separation pay computed in accordance with Section 9 of the Washington Job Protection Agreement of May 1936; or (4) continue on a furloughed status with suspension of all protective benefits with rights and obligations to recall to service in his craft in accordance with existing schedule rules. If upon recall his protective period has not expired, he will again be subject to protective benefits.

NOTE: An employee who elects option (2) and changes his residence will not be entitled to moving expenses if he later decides to return to the original point where he holds seniority.

3. If the vacancy is not filled by following the procedure in paragraphs 1 and 2 Carrier, at its option, may offer the vacancy to a non-protected employee with a seniority date prior to June 25, 1980 who has not yet become a "protected employee". A non-protected employee accepting the offer will be considered a "protected employee" when he physically assumes the position.

NOTE: "Non-protected employee" as used in this paragraph is an employee with a seniority date prior to June 25, 1980 who has not as yet acquired a "protected" status pursuant to Section 2(c) of the September 4, 1979 Agreement.

4. Employees transferred to another point pursuant to paragraphs 2 or 3 of this Section II will be entitled to moving benefits if change in residence is required and actually made. Such employees will have their name placed on the Seniority Roster at the point to which transferred immediately below the last protected employee with the same seniority date as the last protected employee or a seniority date of June 24, 1980. Such employees will retain their seniority at their original point until they can hold a regular assignment there, at which time they must decide and advise Carrier in writing at which point they desire their seniority to be maintained.

NOTE: An employee who decides to return to the original point where he holds seniority will not be entitled to moving expenses.

5. *Where two employees have the same seniority date the employee youngest in age will be considered the junior employee.

III. "Change in residence" as used in this Agreement shall be as defined in Section 6 of the September 4, 1979 Agreement.

IV. The Carrier and the Organization recognize that in transferring employees, situations may develop where it would be mutally advantageous to follow procedures other than those set forth in this agreement. In such event the parties to this agreement

AGREEMENT "H"
(CARMEN)
FILE: M-20-12-01(6)

V. 1. This Agreement shall constitute the agreement referred to in Section 4(a) of Appendix III (New York Dock) that is required before changes can be made. Accordingly the provisions set forth herein shall substitute for the provisions set forth in Section 4(a) of Article I of New York Dock which Section shall be inapplicable.

2. This Agreement is intended to clarify conditions, responsibilities and obligations of protected employees. Nothing contained in this Agreement shall be construed to eliminate or reduce any existing conditions, responsibilities or obligations pertaining to protected employees as set forth in any rule, agreement, including the September 4, 1979 Agreement or in "New York Dock Conditions", I.C.C., Finance Docket 28250.

VI. This Agreement to be effective September 23, 1981.

FOR THE EMPLOYEES:

General Chairman B.R.C.(DT&I)

General Chairman B.R.C.(GTW)

FOR THE DETROIT, TOLEDO & IRONTON RR:

Director, Labor Relations

FOR THE GRAND TRUNK WESTERN RAILROAD CO

Director, Labor Relations

Signed at Detroit, MI

DATE: September 23, 1981